

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:01:BGDusenberry
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date: January 06, 2009

to: Russ J. Thielman
Director
Service Wide Interest Program
(SBSE)

Attn: Marie Bardin

from: Blaise G. Dusenberry
Senior Technician Reviewer, Branch 1
Office of the Associate Chief Counsel (Procedure & Administration)

subject: Application of Section 6601(c) in SFR Situations

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Does Section 6601(c) apply in the case of a taxpayer who has closed a delinquent return filing investigation (or TDI) with the submission of a delinquent return, rather than the execution of a Form 870 or other consent to assessment?

CONCLUSION

No, the interest free period provided by section 6601(c) does not apply when the taxpayer closes a delinquency investigation by submitting a return. The execution of a Form 870 is not the legal equivalent of filing a return.

FACTS

In your memorandum of September 2, 2008, you requested our views on the issue noted above, while advising that the inquiry was not case specific. For purposes of this discussion, however, we suggest the following facts would be typical. In the usual TDI

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(Taxpayer Delinquency Inquiry), a taxpayer fails to file a return. Third party information reports, however, suggest that the taxpayer has received income and would owe a tax. Accordingly, the Service sends an inquiry letter, stating that a return has not been received and requesting the taxpayer file. If the taxpayer fails to respond, an examination follows. Following the procedures set forth in Treas. Reg. Section 301.6020-1, the examiner will prepare a section 6020(b) return during the course of the examination. The taxpayer should be asked to sign the return so prepared, or may be offered a Form 870 or other form consenting to the assessment of the tax liability.

In the past, the examination would often be closed pursuant to the procedures set forth in Rev. Rul. 74-203, 1974-1 C.B. 330, revoked by Rev. Rul. 2005-59, 2005-2 C.B. 505. Those procedures allowed taxpayers who would otherwise be required to file a joint return to claim joint filing status and joint filing rates by signing a Form 870 consenting to the assessment of the amount determined as the deficiency (at the joint rate) at the close of the examination. However, due to developments in the law the Service revoked Rev. Rul. 74-203, as noted above.

LAW AND ANALYSIS

Section 6601(a) provides, generally, that if an amount of tax is not paid on or before the date prescribed for payment, interest shall be paid for the period from the due date to the date of payment. Section 6601(c) provides that "in the case of a deficiency as defined by section 6211, if a waiver of restrictions under section 6213(d) on the assessment of the deficiency has been filed, and if notice and demand ...for payment of such deficiency is not made within 30 days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such 30th day and ending with the date of notice and demand...." *Id.*

Rev. Rul. 2005-59, 2005-2 C.B. 505, holds that documents made by the Service, as authorized by section 6020(b), do not qualify as a return of the taxpayers because those documents do not meet the requirements of Beard v. Commissioner, 82 T.C. 766 (1984), aff'd 793 F.2d 139 (6th Cir. 1986). In addition to revoking Rev. Rul. 74-203, Rev. Rul. 2005-59 further clarified Service position to state that if the taxpayers execute the section 6020(b) documents prepared by the Service under penalties of perjury, such executed documents constitute the return of the taxpayers. *Id.* See also section 6020(a). As your memorandum correctly noted, only a signed return executed under penalty of perjury can be considered a valid return for purposes of the period of limitations. We believe this result also applies to section 6601(c).

Your memorandum noted a perception that an unfair discrepancy exists between taxpayers filing returns as contrasted with taxpayers agreeing to execute a consent unless section 6601(c) is applied to both groups. We disagree. When a taxpayer executes a Form 870 or other consent to assess a deficiency, the interest free period provided by section 6601(c) only applies to the period described in section 6601(c). By statute, interest is not imposed if the notice and demand for payment of the deficiency

agreed to in the consent has not been issued within 30 days after the execution of the consent. Section 6601(c) exists, therefore, to encourage the Service to promptly process consents to assess.

Notwithstanding section 6601(c), principles of sound tax administration provide good reasons for the Service to encourage taxpayers to execute returns, even when they are delinquent. A taxpayer may be entitled to a refund, and filing the return also meets the requirement that the taxpayer file a written claim for refund. A return has the effect of commencing the running of the periods of limitations and collection. It allows the accrual period for the failure to file penalty to come to an end. It may have an effect on the taxpayer's subsequent bankruptcy filing, if any. One goal of promulgating Rev. Rul. 2005-59 was the desire to encourage examiners to follow the procedures set forth in Reg. Section 301.6020-1, and encourage taxpayers to file returns, rather than simply consent to assessment.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

We understand this advice may be used in part to carry out a revision of section 20.2.5 of the IRM. We would be happy to assist in the development of such a revision. This writing constitutes program advice, and as such may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-7402 if you have any further questions.